Major Enterpreneur Sdn Bhd v YAB Menteri Besar Kedah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-01(NCVC)(W)-193–06 OF 2014
ABDUL AZIZ ABDUL RAHIM, VARGHESE GEORGE AND VERNON ONG JJCA
18 MARCH 2016

Civil Procedure — Time — When time to run from — Appellant and respondents entered into joint venture agreement — Respondents breached agreement — Appellant brought action against respondent — Trial court dismissed claim on ground of limitation of time — Appellant appealed — Whether agreement still subsisting until proceeding — When cause of action accrued — Whether claim time barred

The appellant entered into a joint venture agreement ('JVA') with the respondents to develop project known as Kedah International Resort City on 19 December 1995. For this purpose, a joint venture company ('JVC') was formed known as Kedah Resort City Sdn Bhd ('KRC'). According to the JVA, the obligations of the second respondent were to transfer the state land to the JVC as its equity contribution within six months from the formation of the JVC or within such extended time; and to cause the private land to be compulsorily acquired and thereafter alienated to JVC. On the other hand, the appellant's obligation was to cause JVC to increase its authorised and paid up capital and subscribe in cash for such portion of the increased capital of JVC in the proportion of its shareholding. The second respondent failed to transfer the state land to the JVC within the six months pursuant to the JVA. The appellant had enquired the first respondent on the transfer of the state land but did not receive any response. Consequently, on 12 July 2010, the appellant brought an action against the respondents for breach of the agreement. At the end of the proceeding, the learned judge agreed with the respondents and held that the breach occurred on 18 June 1996 the last date when the second respondent was to transfer the land; or the latest date was in 2003 when the approved layout plan lapsed due to the failure to transfer the state land. The notice of demand dated 23 June 2009 was not in relation to when the breach occurred as contended by the appellant. The learned judge dismissed the claim. Hence, this appeal. The only issue to be determined in this appeal was whether the appellant's claim against the respondents was time barred. The appellant submitted that all along until the filing of the suit they had elected to treat the contract as subsisting and not otherwise, thus, the action was not time barred. In reply, the respondents contended that the breach occurred on 18 June 1996 the last date when the second respondent was to transfer the land.

Held, allowing the appeal with costs of RM20,000:

(1) It was obvious on the evidence that both the appellant and the second respondent treated the JVA as subsisting and continuing. Even in 2008, representatives of the appellant had met with officers of the second and first respondents (after the change of the state government) and had been assured that the project would be continued and the transfer of the land to KRC would be expedited. Further two new directors (to replace outgoing ones) were appointed to the Board of KRC at about this time as well (see para 15).

(2) In her written submission the assistant state legal adviser (counsel for the respondents) conceded that the second respondent had not transferred the land to the JVC as agreed under cl 3.1(a) of the JVA and the respondents were well aware that there was no land to be transferred to the JVC at the end of six months after the incorporation of the JVC. However the learned judge ignored this evidence and the evidence as to the negotiation between the parties in trying to save the JVA and the project. There was a breach of the JVA by the second respondent but there was no evidence that the appellant accepted the breach and terminated the JVA before the filing of the suit against the respondents. The court agreed with the appellant's argument that it only rescinded the contract upon filing of the action. Therefore the appellant's action filed in 2010 was brought within time and not statutorily barred (see paras 16–17).

[Bahasa Malaysia summary

Perayu memasuki perjanjian usaha sama ('perjanjian') dengan responden untuk membangunkan projek yang dikenali sebagai Kedah International Resort City pada 19 Disember 1995. Bagi tujuan ini, syarikat usaha sama ('SUS') ditubuhkan dikenali sebagai Kedah Resort City Sdn Bhd ('KRC'). Mengikut perjanjian, tanggungjawab responden kedua adalah untuk memindahkan tanah kerajaan kepada SUS sebagai sumbangan ekuitinya dalam masa enam bulan dari penubuhan SUS tersebut atau dalam masa yang dilanjutkan; dan menyebabkan tanah persendirian diambil alih secara wajib dan kemudiannya dipindahkan kepada SUS. Sebaliknya, tanggungjawab perayu adalah untuk membuat SUS untuk menambahkan modal dibenarkan dan berbayarnya dan menyumbang dalam tunai bagi bahagian modal yang ditambah dalam SUS dalam bahagian pemegangan sahamnya. Responden kedua gagal untuk memindahkan tanah negeri kepada SUS dalam masa enam bulan berikutan perjanjian tersebut. Perayu telah bertanyakan kepada responden pertama mengenai pemindahan tanah negeri tersebut tetapi tidak menerima apa-apa jawapan. Akibatnya, pada 12 Julai 2010, perayu membawa tindakan terhadap responden-responden bagi pelanggaran perjanjian tersebut. Pada akhir prosiding, hakim bicara yang bijaksana bersetuju dengan responden-responden dan memutuskan bahawa pelanggaran berlaku pada

18 Jun 1996 tarikh akhir untuk responden kedua memindahkan tanah tersebut; atau tarikh terbaru adalah pada tahun 2003 apabila pelan susur atur yang diluluskan luput akibat kegagalan untuk memindahkan tanah negeri tersebut. Notis tuntutan bertarikh 23 Jun 2009 adalah tidak berkaitan apabila pelanggaran berlaku seperti yang dihujahkan oleh perayu. Hakim yang bijaksana menolak tuntutan tersebut. Maka rayuan ini. Satu-satunya isu untuk ditentukan dalam rayuan ini adalah sama ada tuntutan perayu terhadap responden-responden adalah dihalang masa. Perayu berhujah bahawa pada kesemua masa sehingga pemfailan tindakan tersebut mereka memilih untuk menganggap kontrak tersebut sebagai wujud dan bukan sebaliknya, oleh itu, tindakan bukanlah dihalang masa. Dalam jawapan, responden-responden berhujah bahawa pelanggaran berlaku pada 18 Jun 1996 tarikh akhir untuk responden kedua memindahkan tanah tersebut.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM20,000:

(1) Adalah jelas atas keterangan bahawa kedua-dua perayu dan responden kedua menganggap perjanjian tersebut sebagai wujud dan berterusan. Malahan pada tahun 2008, wakil-wakil perayu telah bertemu dengan pegawai-pegawai responden-responden pertama dan kedua (selepas penukaran Kerajaan Negeri) dan telah diyakinkan bahawa projek tersebut akan disambung dan pemindahan tanah kepada KRC akan dipercepatkan. Selanjutnya dua pengarah baru (untuk menggantikan pengarah yang keluar) dilantik kepada Lembaga KRC pada masa yang sama juga (lihat perenggan 15).

(2) Dalam hujahan bertulisnya penolong penasihat undang-undang (peguam untuk responden-responden) bersetuju bahawa responden kedua tidak memindahkan tanah tersebut kepada SUS seperti yang dipersetujui di bawah klausa cl 3.1(a) perjanjian dan responden-responden sedar bahawa tidak ada tanah yang akan dipindahkan kepada SUS pada akhir enam bulan selepas penubuhan SUS. Walau bagaimanapun hakim yang bijaksana tidak memperdulikan keterangan ini dan keterangan mengenai perundingan di antara pihak-pihak dalam percubaan untuk menyelamatkan perjanjian dan projek tersebut. Terdapat pelanggaran perjanjian oleh responden kedua tetapi tidak terdapat keterangan bahawa perayu menerima pelanggaran tersebut dan menamatkan perjanjian sebelum pemfailan tindakan terhadap responden-responden. Mahkamah bersetuju dengan hujahan perayu bahawa ia hanya membatalkan kontrak tersebut selepas pemfailan tindakan tersebut. Dengan itu tindakan perayu yang difailkan pada tahun 2010 difailkan dalam masa dan tidak dihalang masa dari segi undang-undang (lihat perenggan 16–17).]

Notes

For a case on when time to run from, see 2(5) *Mallal's Digest* (5th Ed, 2015) para 1034.

Cases referred to

Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd [1998] 3 MLJ 860, CA (refd)
Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay [1997] 3 MLJ 323, CA (refd)
Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420, CA (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308, FC (refd)

Legislation referred to

Contracts Act 1950 s 40
National Land Code Form 5A
Public Authorities Protection Act 1948

Appeal from: Civil Suit No K-01(NCVC)(W)-193–06 of 2014 (High Court, Alor Setar)

Joseph Yeo, (Apparao Apana, JJ Naidu and Cik Sabarina bt Mohamed Sidek with him) (Tengku Azlina, Rao, Low & Assoc) for the appellant.
Fariza bt Hamzah (Assistant State Legal Advisor, Kedah Legal State Offices) for the respondent.

Abdul Aziz Abdul Rahim JCA:

[1] On 28 April 2014 See Mee Chun J, the learned judge of the High Court at Alor Setar Kedah, dismissed the appellant's ('the plaintiff') claim against the first, second and third respondents ('the defendants') on the ground that the claim is time barred. The learned judge however allowed the plaintiff's claim against the fifth defendant and ordered the fifth defendant to transfer 2m shares in the JV company Kedah Resort City Sdn Bhd ('KRC') to the plaintiff within seven days from the date of the judgment. Further, the learned judge dismissed the counter claim by the first, second, third and fifth defendants. The claim against the fourth defendant had earlier been withdrawn.

[2] The plaintiff now appeals to this court against that decision. There is no appeal by the first, second, third and fifth defendant against the order of dismissal of their counter claim.

[3] The plaintiff claimed against all the defendants are for the following relief:

(a) suatu deklarasi bahawa Defendan-Defendan telah memungkiri Perjanjian Usahasama bertarikh 8.11.1994;

(b) suatu deklarasi bahawa Defendan Kedua memindahmilik Lot-Lot 2,1582 dan 2529 Mukim Merbok; Lot-Lot 8, 12, 13, 16, 776-778, 780, 781, 880, 881, 1028-1030, 1038, 1062, 1064, 109, 1101, 1104, 2009, 2010, 2015, 2016, 2031, 2037, 2038, 2041, 2090-2092 dan Tanah Kerajaan, Mukim Semeling bersama-sama sebahagian hutan simpanan, Daerah Kuala Muda, Kedah Darul Aman.

(c) Secara alternatifnya, Defendan Kelima memindahmilik 2,000,000 saham ke atas nama Plaintif dalam tempoh tujuh (7) hari dari tarikh Perintah/Penghakiman yang diberikan di sini dan Penolong Kanan Pendaftar diberikuasa untuk menandatangani Borang 32A untuk memberi kesan terhadap pemindahan saham tersebut.

(d) jumlah sebanyak RM22,329,971.00 yang merupakan pembangunan Projek tersebut setakat akaun audit dari tahun 1996 sehingga 2007 di bayar oleh Defendan-Defendan secara bersesama dan berasingan;

(e) faedah pada kadar 8% setahun ke atas RM22,329,971.00 daripada Januari 1996 sehingga 31.12.2007 sehingga penyelesaian penuh dibayar oleh Defendan-Defendan secara bersesama dan berasingan;

(f) ganti rugi am ditaksirkan oleh Mahkamah ini.

(g) faedah pada kadar 8% setahun ke atas jumlah yang ditaksirkan daripada tarikh Perintah yang diberikan disini sehingga penyelesaian penuh di bayar oleh Defendan-Defendan secara bersesama dan berasingan;

(h) Kos ditanggung oleh Defendan-Defendan secara bersesama dan berasingan;

(i) Lain-lain relif yang difikirkan wajar, munasabah dan adil oleh Mahkamah ini.

BACKGROUND FACTS

[4] The material facts for this appeal are summarised from the facts in the judgment of the learned High Court judge. There are as follows:

> 2. From the agreed facts in 'D' and 'F', plaintiff and D2 had entered into the JV and a shareholders agreement (SA) also dated 8 November 1994. D1 is the Menteri Besar, D2 the State Government, D3 the State Secretary who signed both agreements and D5 the implementing agency for the project. The JV was to develop a project known as Kedah International Resort City and for this purpose a joint venture company was to be formed.
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> 4. In the statement of claim plaintiff states the project area to be approximately 1125.2 acres of state land including forest reserve and approximately 290.7 acres of private land. This is disputed by defendants who state the project area to be 1,406.19 acres consisting of state land (963 acres), forest reserve (158 acres),

acquired private land (148.17 acres) and private land of which acquisition was not yet completed (142.53 acres). It was further pleaded the application for forest reserve land was not approved by D2 and plaintiff had agreed to it.

5. In respect of the joint venture company (JVC) which was agreed to be formed (cl 2.1), cl 2.2 of JV required it to have an initial issued and paid up capital of RM2 consisting of two ordinary shares of RM1 each while cl 2.3 provided the first two shares would be issued to D2/nominee and plaintif. It was agreed in cl 2.4 any increase in the authorised and paid up capital would be in the proportion of 40% to D2/nominee and 60% to plaintiff. The share capital of JVC and all matters relating to JVC shall be set out in SA (cl 2.5). The obligations of D2 are set out in cl 3, of which the primary obligation is to transfer the state land to JVC as its equity contribution within six months from the formation or within such extended time and to cause the private land to be compulsorily acquired and thereafter alienated to JVC. Plaintiff's obligation in cl 4 was to cause JVC to increase its authorised and paid up capital and subscribe in cash for such portion of the increased capital of JVC in the proportion of its shareholding. JVC obligation in cl 5 was to pay to the relevant authority the exact compensation determined by the land collector to be paid to land owners for the acquisition of the private land and to be responsible for the entire cost and expenses of the project.

7. It is an agreed fact the JVC had been formed with the incorporation of Kedah Resort City Sdn Bhd (KRC) on 19 December 1995 to carry out the project on a joint venture. It is further an agreed fact D5 would be D2's agent in implementing the project and D2's 40% interest in KRC would be held by D5.

8. As evident from the terms of JV the obligation of D2 was to transfer the state land to KRC as its equity contribution within six months from the formation or within such extended time and to cause the private land to be compulsory acquired and thereafter alienated to KRC (cl 3). D1–D3 does not appear to dispute the land was never transferred to KRC. This is apparent from its written submission where in its conclusion at p 6 it is stated 'diakui memang telah berlaku kemungkiran perjanjian ini sejak awal berdasarkan perenggan 3 perjanjian-perjanjian telah gagal untuk memberi tanah kepada syarikat usahasama seperti yang diperuntukkan dalam perjanjian'. However D1–D3 contend limitation applies as at the earliest time began to run was in 1996 from when the master plan for the project lapsed or the least in 2003 when the approved layout plan similarly lapsed. The lapse was due to the failure to transfer the state land.

9. In this instant case D2 ought to have transferred the state land to KRC within six months from its formation or within such extended time. KRC was incorporated on 19 December 1995 which meant the state land had to be transferred latest by six months from 19 December 1995 that is 18 June 1996. Plaintiff is not relying on extension of time for the transfer and in any event no evidence was adduced on this. Instead it was submitted by plaintiff time starts from when it gave its notice of demand dated 23 June 2009 (B2 313-315). In *Nasri v Mesah* [1971] 1 MLJ 32 it was stated in held '(2) a cause of action accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach'. It was PW1's evidence in Q&A 36 at p 22 that 'due to the delay and failure of D2 to alienate the state land based on the revised plan within the required time, the approved layout plan was again lapsed'. As time runs from the date of breach this

court agrees with D1–D3 contention that taking 2003 as the latest possible date of breach when the approved layout plan lapsed due to the failure to transfer the state land, plaintiff's claim filed on 12 July 2010 would be time barred. The notice of demand is not in relation to when the breach occurred. As D1–D3 are public authorities the limitation of 36 months in Public Authorities Protection Act 1948 applies. The time bar is only in relation to Plaintiff's claim against D1–D3.

[5] The only issue in this appeal is whether the plaintiff claim against the defendants is time barred? To determine this question it is pertinent to note that the defendants are public authorities for the purpose of Public Authorities Protection Act 1948. The first defendant is the Menteri Besar Kedah. The second defendant is the State Government of Kedah and the third defendant is the Setiausaha Negeri, Kerajaan Negeri Kedah.

THE APPELLANT'S SUBMISSION

[6] Learned counsel for the appellant submitted that the learned judge erred in dismissing the plaintiff's claim on the ground of limitation. He argued that based on the chronology of events below the plaintiff's claim is not barred by limitation.

Chronology of events

No	Year	Events
1.	September 1993	At a meeting with Hj Ariffin bin Hj Yusoff (representative of Perbadanan Pembangunan Negeri Kedah) in Dubai sought and invited investments to Kedah generally and in particular to the Agricultural Park project. Subsequently further meetings were held in Kuala Lumpur and Alor Setar.
2.	4 October 1993	Meeting with Perbadanan Pembangunan Pertanian Negeri Kedah discussed on the proposal of development of agricultural complex.
3.	18 December 1993	Meeting with the State Exco at the State Economic Planning Unit, Wisma Darul Aman, Alor Setar discussed on the implementation of the project and commitment of both parties to participate in the development of project.

No	Year	Events
4.	13 February 1994	Presentation session of proposed development of Kedah Agriculture Park-Resort Centre Gunung Jerai by the appellant at the State Operation Room Wisma Darul Aman, Alor Setar, Kedah Darul Aman. The SADC also arranged programs to meet the Chief Minister, YAB Tan Sri Dato' Seri Hj Osman bin Hj Aroff, the State Secretary The Hon Dato' Hj Ahmad Basri bin Mohd Akil and Director of State Economic Planning Unit, the Hon Dato' Hj Mohd Zain bin Osman. As the meeting was before the Chief Minister and Exco members ie: the decision makers, the appellant's proposal was approved forthwith.
5.	12 June 1994	MOU was signed by the Chief Minister on behalf of the State Government of Kedah and Syed Safaraz on behalf of the appellant at a brief ceremony at Wisma Darul Aman.
6.	8 November 1994	Joint venture agreement was signed by the State Secretary Dato' Hj Ahmad Basri bin Mohd Akil on behalf of Kedah State in the presence of Chief Minister Tan Sri Hj Osman bin Hj Aroff and the appellant was represented by Syed Safaraz as managing director in presence of HRH Shaikh Abdul Rahman bin Nasir Al Jasem Al Thani, a member of the ruling family of Qatar. The joint venture agreement set out all the terms and conditions to develop approximately 1150 acres of lands in the State of Kedah into an agricultural and recreational resort. The project was known as Kedah International Resort City was conceptionalised as Resort City at Tupah, District of Kuala Muda consisting of commercial, recreation and residential.
7.	8 November 1994	The shareholders agreement was signed by the appellant and respondents to set out all the terms and conditions.
8.	3 April 1995	FIC approved.
9.	19 December 1995	The JV Company, Kedah Resort City Sdn Bhd ('KRC') was incorporated.

No	Year	Events
10.	1996 and 2001	Upon obtaining FIC approval and forming KRC, the appellant started by appointing a leading survey company of Malaysia, Juruukur Teguh (Kedah) Sdn Bhd to immediately start the topographic survey of all the State and private lands allocated for the project. The appellant also appointed a famous British Town Planner and Architect, Messrs Surti and Partners to prepare the Master Plan of the project and engaged another British firm Messrs Carlbro for preparation of the feasibility report of the project. 2001 — Due to changes of some component in master plan of the project and as requested by the respondents, the appellant updated the outline feasibility report.
11.	14 February 2001	MMK approved that the appointment of PKB as lead agency to protect the second respondent's interest in the project.
12.	7 March 1996	First master pelan of the project was approved by State Exco and full Council Meeting at office of the Sungai Petani Municipal Council was held on 26 February 1996 and 29 February 1996. A letter from the second respondent also confirmed that State Government of Kedah has completed all formalities to transfer 1150 acres land as mentioned in JV agreement as well as approximately 336 acres of additional land as per letter No YPEN(K) 102A Jd 3/6 dated 17 October 1995 to Major Entrepreneurs Sdn Bhd. The Chief Minister and Exco in 2001 changed the first master pelan to suit the changes to market conditions and other business requirements due to prolonged delay of the project.

No	Year	Events
13.	1998	The new Chief Minister Tan Sri Sanusi Junid (1996–1999) upon his appointment cancelled all projects. However when Syed Safaraz met him together with the Chairman Prince on 22 April 1998, the Chief Minister has agreed to revise the project, so, a new master pelan again was submitted to planning committee but nothing materialised.
14.	2000	The respondents then requested assistance from the appellant to provide re-settlement arrangement for the squatters. After a few discussions and submission of few options available, it was finally agreed that the second respondent offer the appellant two parcels of lands in the Mukim of Semeling to be paid by cash by the appellant for development and to accommodate the resettlement for the squatters in the project. These two parcels of land is not part of KRC project land.
15.	5 August 2002	Dato' Ku Naha bin Ku Ibrahim, Deputy of State Secretary issued a letter to Yang DiPertua, Majlis Perbandaran Sungai Petani acknowledging that the joint venture between the State of Kedah and the plaintiff, the Ruling family of Qatar and then urged the Majlis Perbandaran Sungai Petani to give preference for the application and implementation of the project so that the State can achieve its objective.
16.	12 September 2002	The appellant paid the total premium for the two lots for a sum RM1,711,196.83 to the Pentadbir Tanah Kuala Muda as per the notice of Form 5A prepared by the Pentadbir Tanah Kuala Muda.
17.	18 December 2002	The State Council Meeting was held on 18 December 2002. There is another letter of commitment by State of Kedah confirming that 1,416.744 acres of lands were approved and the approval of transferring the lands to KRC as per the JV agreement. The said letter also notified that the State agent to expedite the matter that had been approved by the Council.

No	Year	Events
18.	30 June 2003	In 2003, due to subsequent changes to market condition and adjustments to meet and specific needs of the respondent, changes to the original plan were made and the pelan for a golf course in the project was deleted. A revised layout plan then was resubmitted to the Council and subsequently was approved on 30 June 2003 Pelan No PRM/K/02/18 (PINDAAN 2). This is confirmed by the letter from Majlis Perbandaran Sungai Petani Kedah dated 30 December 2003.
19.	1996–2013	The appellant had difficulties when the changes in administration of the first respondent took place from 1985 until the present Chief Minister. Every time change of leadership the appellant had to go and meet the Menteri Besar and made presentation of the project to the respective Chief Minister and new Excos and including Tan Sri Sanusi bin Junid (1996–1999), Dato' Seri Syed Razak bin Syed Zain Barakbah (1999–2005) Dato' Hj Mahdzir bin Khalid (2005-2008) and Dato' Seri Ustaz Hj Azizan bin Abdul Razak (2008–2013). All the Menteri Besar had given assurances to continue and proceed with the project but nothing had been effectively took place. Upon appointment of each new Menteri Besar, the Prince had met with each of the Menteri Besar who was assured by each of the Menteri Besar of their financial and technical support of the project during the tenure of every Menteri Besar. This individual meetings with the various Menteri Besar had caused the appellant to incur costs and expenses for the Prince to travel to Alor Setar using his private jet and who have to adhere to a lot of protocols.

No	Year	Events
20.	21 June 2004	A meeting was held on 21 June 2004 and chaired by State Secretary, Dato' Wira Ku Nahar bin Ku Ibrahim which only discussed on the current status and the land matters for KRC and the progress report for the project which will be forwarded to the coming State Exco Meeting.
21.	12 July 2004	Minutes from the respondents.
22.	20 October 2004	Majlis Mesyuarat Kerajaan Negeri Kedah (MMKNK) had approved the application for the state land for the project known as Kedah International Resort City Kawasan Tupah, Mukim Bujang, Mukim Semeling dan Mukim Merbok, Daerah Kuala Muda.
23.	10 November 2004	A report on the discussion of the stage of progress of the project.
24.	21 March 2005	Further meeting held on 21 March 2005.
25.	4 July 2005	Permodalan Kedah Berhad submitted its application to Land Office District of Kuala Muda.
26.	17 December 2005	Disbursement of allowances for members for attending committee meetings on: (a) 30 January 2005 at PKB's Office at Alor Setar; (b) 21 March 2005 at PKB Head Office, Alor Setar; and (c) 23 May 2005 at Shangri-La Hotel Board Room, Kuala Lumpur.
27.	20 December 2005	A letter from respondents to the appellant confirming that PKB has applied a total of 1,233.49 acres of State land and 172.60 forest reserve land from State Government of Kedah dated 4 July 2005.
28.	10 June 2008	The appellant met with the officer of the second respondent.
29.	13 August 2008	The project was presented to the first respondent and the new Exco members of the second respondent.

No	Year	Events
30.	22 August 2008	The appellant's chairman and shareholder, ie the Prince met with the first respondent in the presence of other directors KRC and made a request to expedite the transfer of the state land to KRC. The first respondent had agreed to continue with the project and gave assurance to expedite PKB's application for the transfer of land and also the appointment of two State Government Directors for KRC Board as the previous directors have resigned due to the change of the state government. The second respondent assured the Prince a speedy transfer of land and implementation of the project. However nothing was done, the application of the PKB on transfer of land till to date is still pending.
31.	23 June 2009	The appellant through its solicitors Messrs Tengku Azlina, Rao, Low & Associates (TARL) issued a letter requesting the first respondent to respond on the alienation of the state land and the appointment of state government directors for KRC Board.
32.	3 August 2009	TARL issued a reminder to the first respondent to respond to TARL's earlier letter of 23 June 2009.
33.	9 July 2010	Writ was filed.

[7] It was argued that the JV was and still subsisting until the date the plaintiff filed the suit against the defendants. It has not been terminated by the appellant. The appellant, learned counsel said, has the option either to terminate the JV upon the breach of the same by the second defendant in failing to transfer the state land to the plaintiff in 1996 or 2003 or to treat the JV as continuing and claim for damages. Learned counsel cited several authorities to support this argument — see s 40 of the Contracts Act 1950; *Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay* [1997] 3 MLJ 323; *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151; *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860; and *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420.

[8] It was submitted that the evidence in this case points to the fact the JV was still subsisting and that both parties accepted that the JV as still subsisting and valid. He argued that this is evident from the minutes of meeting held on 21 March 2005 where there was discussion to review the JV agreement. It was

also submitted that as a follow-up to the decision made at the meeting, the fifth defendant proceeded to apply for the alienation of the state land. A letter dated 4 July 2005 to that effect was sent to Pentadbir Tanah Daerah Kuala Muda by the fifth defendant — see p 714 *RR Bhg* C 2(2). Further, on 20 December 2005 the fifth defendant had faxed a letter to the JV company that it had applied for state land for the purpose of the JV project and that the land would be transferred to the JV company when the alienation is completed. It was submitted that after lapse of five years, plaintiff wrote to the then Menteri Besar of Kedah to enquire on the status of the application for the alienation of the state land. But the plaintiff did not receive any response. Only then the plaintiff indicated and gave notice of its intention to sue to recover its losses. On 12 July 2010, the plaintiff commenced the action against all the defendants. Thus, it was argued that time starts to run only from 12 July 2010 and not in 1996 or 2003 because, on the authority of *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308, filing of the action served as notice of rescission of the contract. All along until the filing of the suit, it was submitted, the plaintiff has elected to treat the contract as subsisting and not otherwise. Therefore the plaintiff's action is well within the limitation period.

THE DEFENDANTS' SUBMISSION

[9] In response to the above submission by learned counsel for the appellant, the assistant state legal advisor who appeared for the defendants submitted in her written submission as follows:

> 4.4 Berdasarkan perjanjian usahasama tersebut, responden 1–3 hendaklah memberi milik tanah kepada syarikat usahasama dalam masa 6 bulan daripada tarikh syarikat usahasama ditubuhkan (19.12.1995) atau dalam tempoh lanjutan masa yang diberikan yang diperlukan.
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> 4.5 Responden 1–3 tidak menafikan bahawa tiada tanah telah diberimilik kepada syarikat sehingga tempoh 6 bulan tersebut luput dan tiada apa-apa notis diberikan bagi maksud pelanjutan masa yang dinyatakan.
>
> 4.6 Dengan rendah diri dihujahkan bahawa dengan kegagalan responden-responden untuk memindah milik tanah kepada perayu dalam masa yang ditetapkan batasan had masa telah set in seawal 18.6.1996, iaitu 6 bulan setelah syarikat usahasama ditubuhkan.
>
> 4.7 Responden-responden hujahkan bahawa kausa tindakan timbul apabila telah berlaku kegagalan di pihak responden untuk memberimilik tanah kepada syarikat dalam masa yang ditetapkan — 6 bulan setelah syarikat usahasama ditubuhkan.
>
> 4.8 Oleh itu, responden-responden hujahkan bahawa kausa tindakan telah wujud paling awal pada 18.6.1996 — apabila responden-responden gagal memberimilik tanah kepada syarikat usahasama dalam masa 6 bulan setelah ia ditubuhkan sebagaimana yang disyaratkan dalam perjanjian usahasama.
>
> 4.9 Oleh itu, tindakan perayu kini dibatasi oleh had masa di bawah s 2(a) PAPA 1948.

4.10 Di dalam kes *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, Mahkamah Persekutuan telah memutuskan —

> In so far as PAPA is concerned, the law is settled. The Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 held that limitation under PAPA is 'just as much a 'right' as any other statutory or contractual protection against a future suit'.

4.11 Dan di dalam kes *Machinchang Skyways Sdn Bhd & Langkawi Cable Cars Sdn Bhd v Lembaga Pembangunan Langkawi & Syarikat Prasarana Negara Berhad* [K-02(IM)-2716-11/2012], Mahkamah Rayuan telah memutuskan —

> [22] Given that the plaintiffs had known on 10.11.2002 of the fact that the maintenance, operation and management of the Cable Car System was given to the second defendant, it would be at that point of time that there was an infringement or threat of infringement of the plaintiffs' rights under the JVA. And if there is any conspiracy between the first and the second defendants as alleged by the plaintiffs, it would also be on 10.11.2002. On 10.11.2002, the entire set of facts giving rise to an enforceable claim were present (see *Nasri v Mesah* [1971] 1 MLJ 32).

4.12 Dengan rendah diri dihujahkan bahawa tarikh mulanya batasan had masa ialah tarikh mulanya kausa tindakan perayu terhadap responden wujud, iaitu pada 18.6.1996, apabila responden-responden gagal memberimilik tanah kepada perayu.

THE HIGH COURT'S DECISION

[10] The learned judge apparently agreed with the submission by the defendants. She held that the breach occurred on 18 June 1996 the last date when the second defendant was to transfer the land to the plaintiff; or the learned judge said the latest date was in 2003 when the approved layout plan lapsed due to the failure to transfer the state land to the plaintiff. In fact on this basis the learned judge seemed to accept that the breach could have occurred also in 1996 when the master plan for the project lapsed. The learned judge wrote in her judgment as follows:

> 8. As evident from the terms of JV the obligation of D2 was to transfer the state land to KRC as its equity contribution within six months from the formation or within such extended time and to cause the private land to be compulsory acquired and thereafter alienated to KRC (cl 3). D1–D3 does not appear to dispute the land was never transferred to KRC. This is apparent from its written submission where in its conclusion at p 6 it is stated 'diakui memang telah berlaku kemungkiran perjanjian ini sejak awal berdasarkan perenggan 3 perjanjian-perjanjian telah gagal untuk memberi tanah kepada syarikat usahasama seperti yang diperuntukkan dalam perjanjian'. However D1–D3 contend limitation applies as at the earliest time began to run was in 1996 from when the master plan for the project lapsed or the least in 2003 when the approved layout plan similarly lapsed. The lapse was due to the failure to transfer the state land.

9. In this instant case D2 ought to have transferred the state land to KRC within six months from its formation or within such extended time. KRC was incorporated on 19 December 1995 which meant the state land had to be transferred latest by six months from 19 December 1995 that is 18 June 1996. Plaintiff is not relying on extension of time for the transfer and in any event no evidence was adduced on this. Instead it was submitted by plaintiff time starts from when it gave its notice of demand dated 23 June 2009 (B2 313–315). In *Nasri v Mesah* [1971] 1 MLJ 32 it was stated in held (2) 'a cause of action accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach'. It was PW1's evidence in Q&A 36 at p 22 that 'due to the delay and failure of D2 to alienate the state land based on the revised plan within the required time, the approved layout plan was again lapsed'. As time runs from the date of breach this court agrees with D1–D3 contention that taking 2003 as the latest possible date of breach when the approved layout plan lapsed due to the failure to transfer the state land, plaintiff's claim filed on 12 July 2010 would be time barred. The notice of demand is not in relation to when the breach occurred. As D1–D3 are public authorities the limitation of 36 months in Public Authorities Protection Act 1948 applies. The time bar is only in relation to plaintiff's claim against D1–D3.

OUR DECISION

[11] The alleged breach of the JV agreement in the present appeal is the failure of the second defendant to transfer the state land free of encumbrances to the JV company under cl 3.1 (a) of the JV agreement. The clause reads:

3. OBLIGATIONS OF KEDAH STATE

3.1 The Kedah State shall —

(a) transfer the state land free of encumbrances to the JV Company as their equity contribution within six month (6) months from the formation of the JVC or within such extended time as may be necessary

[12] On the evidence the learned judge found that the JVC was incorporated on 19 December 1995. Thus the six months period under cl 3.1(a) of the JV agreement expired on 18 June 1996. On that date, the state land was yet to be transferred to the plaintiff by the second defendant. The learned judge also found as a fact that the plaintiff is not relying on any extension of time for the transfer and in fact no evidence was adduced to show any application for extension of time for the purpose of cl 3.1(a) of the JV agreement.

[13] However there is evidence of notice of demand by the plaintiff dated 23 June 2009 to the first defendant (see plaintiff's solicitor letter dated 23 June 2009 at p 836 *ikatan teras perayu (dokumen)*) demanding the transfer of the land to the JVC within 14 days from the date of the letter, there was no response from the defendants. The lack of response can be seen from the plaintiff's solicitor letter dated 3 August 2009 to the first defendant (at p 841

ikatan teras perayu (dokumen)).

[14] From the evidence it is obvious that the second defendant was not in position to comply with cl 3.1(a) of the JVA or the subsequent demand letters for the transfer of the land to the plaintiff by the plaintiff's solicitor mentioned above because as of June 1996 the land has yet to be alienated to fifth defendant by the second defendant. As can be seen from the notice in Borang 5A of the National Land Code (at p 859 *ikatan teras perayu*) sent by the Land Office Kuala Muda to the JVC requesting the deposit of RM838,901.23 for the purpose of completing the alienation of the land, the application for alienation was made in 2001. This is obvious from the notice itself which has reference to 'Bil. Permohonan Tanah 6/2001'. The notice 5A was dated 11 June 2002. The deposit requested was paid only on 12 September 2002.

[15] It was obvious on the evidence that both the plaintiff and the second defendant treated the JVA as subsisting and continuing. Even in *2008* (see chronology of events), representatives of the plaintiff had met with officers of the second defendant and first defendant (after the change of the state government) and had been assured that the project would be continued and the transfer of the land to KRC would be expedited. Further two new directors (to replace outgoing ones) were appointed to the Board of KRC at about this time as well.

[16] In our view on the evidence that we have alluded to above, the parties to the JVA were still interested to go on with the JVA and the project. But the second defendant failed to comply with the obligation under cl 3.1(a) of the JVA. In our view this obligation is fundamental because without the land being transferred to the JVC the project Kedah International Resort City could not take off. In fact in her written submission quouted above the conceded that the second defendant had not transferred the land to the JVC as agreed under cl 3.1(a) of the JV agreement and the defendants were well aware that there was no land to be transferred to the JVC at the end of six months after the incorporation of the JVC. This is obvious because the application for the alienation of the state land to be transferred was made only in 2001. But the learned judge ignored this evidence and the evidence as to the negotiation between the parties in trying to save the JVA and the project. There is a breach of the JVA by the second defendant; but there is no evidence that the plaintiff accepted the breach and terminated the JVA before the filing of the suit against the defendants.

[17] We agree with the appellant's argument that it only rescinded the contract upon filing of the action. Therefore the plaintiff's action filed in 2010 was brought within time and not statutorily barred.

[18] For the above consideration we allowed the appeal and allowed prayer (a) and (f) of the plaintiff's statement of claim with cost of RM20,000 for the appeal only. We set aside the High Court order striking out the plaintiff's claim against first, second and third defendant and remitted the case to the High Court for assessment of damages by the deputy registrar.

Appeal allowed with costs of RM20,000.

Reported by Dzulqarnain Ab Fatar